

**IN THE
SUPREME COURT OF INDIANA**

CASE NUMBER:

**ORDER AMENDING RULES FOR ALTERNATIVE DISPUTE
RESOLUTION**

Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administrative procedures of all courts within this state, *Rule 2.5(B)(6), Guideline 8, and Forms A, B and C* of the *Rules for Alternative Dispute Resolution* are amended to read as follows (deletions shown by striking and new text shown by underlining):

RULES FOR ALTERNATIVE DISPUTE RESOLUTION

Rule 2.5. Qualifications of Mediators.

...

(B) Domestic Relations Cases: Educational Qualifications.

...

(6) ~~A full-time judge may register but not serve as a domestic relations mediator. As part of the judge's judicial service, a judge may serve as a mediator in a case pending before another judicial officer.~~

...

~~GUIDELINE 8. PRE-SUIT MEDIATION~~

Preamble

~~The voluntary resolution of disputes in advance of litigation is a laudatory goal and a favorable development. Parties embarking on this process may find useful the following voluntary guidelines which were developed by the Indiana State Bar Association.~~

~~Guideline 8.1 Initiation of the pre-suit mediation process~~

~~The mediation process is initiated by a request from any party to another. This may be accomplished with a simple letter. See Form A.~~

~~Guideline 8.2 Representation by counsel~~

~~For the mediation process to work, the mediator cannot give legal advice to an individual claimant and simultaneously serve in the conflicting role of an independent neutral. Accordingly, individual claimants shall be represented by their own lawyer. No request for pre-suit mediation shall be made to an unrepresented individual claimant. A claimant who does not have a lawyer may obtain help in finding one by contacting the local bar association's referral service.~~

~~Guideline 8.3 Selection of a mediator~~

~~The parties should select a mediator of their own choice and agree on the method of compensating the mediator. Usually, the mediator's fee will be shared equally by the parties.~~

~~Guideline 8.4 The pre-suit mediation agreement~~

~~The parties should enter into a written agreement in accordance with Form B. This agreement should, among other things, protect the confidentiality of the pre-suit mediation process as set forth in ADR Rule 2.12 and provide for immunity of mediators as set forth in ADR Rule 1.5.~~

~~Guideline 8.5 Scheduling the mediation~~

~~The parties and mediator should schedule the mediation promptly, recognizing that the value of pre-suit mediation depends on an expeditious resolution.~~

~~Guideline 8.6 Mediation submissions~~

~~Each side is encouraged to submit to the mediator a confidential statement of its case as outlined in ADR Rule 2.7(c).~~

~~Guideline 8.7 Good faith~~

~~The parties should participate in the mediation in good faith. Needed information should be shared so that each party can reasonably evaluate its respective position. The parties are not required to reach agreement.~~

~~Guideline 8.8 Settlement agreement~~

~~If an agreement to settle is reached, it shall be reduced to writing promptly and a copy provided to all parties.~~

~~Guideline 8.9 Mediator's report~~

~~To facilitate the collection of data, the mediator should file a report with the ISBA in accordance with Form C. The report should be limited to whether the matter was resolved and the type of case involved. It should not identify the parties or disclose any other details about the dispute, the mediation process, or about the settlement agreement.~~

Guideline 8.10 Subsequent ADR measures

~~Unless otherwise agreed, nothing in the pre-suit mediation process should preclude any later litigation or alternative dispute resolution in the form of post-suit mediation, arbitration or other ADR method as provided in the Indiana Rules for Alternative Dispute Resolution.~~

Guideline 8.11 Statute of limitations

~~The parties are cautioned that pre-suit mediation does not toll any applicable statute of limitations. Nor does it serve as a substitute for, or constitute compliance with, any other procedural requirements for pursuing a claim such as the formal notice of a party's intent to make a claim required under Indiana's Tort Claims Act. Rather, pre-suit mediation is purely a voluntary process designed to effect early settlement.~~

RULE 8. OPTIONAL EARLY MEDIATION

Preamble.

The voluntary resolution of disputes in advance of litigation is a laudatory goal. Persons desiring the orderly mediation of disputes not in litigation may elect to proceed under this Rule.

Rule 8.1 Who May Use Optional Early Mediation.

By mutual agreement, persons may use the provisions of this Rule to mediate a dispute not in litigation. Persons may participate in dispute resolution under this Rule with or without counsel.

Rule 8.2. Choice of Mediator.

Persons participating in mediation under this Rule shall choose their own mediator and agree on the method of compensating the mediator. Mediation fees will be shared equally unless otherwise agreed. The mediator is governed by the standards of conduct provided in Alternative Dispute Resolution Rule 7.

Rule 8.3. Agreement to Mediate.

Before beginning a mediation under this Rule, participants must sign a written Agreement To Mediate substantially similar to the one shown as Form A to these rules. This agreement must provide for confidentiality in accordance with Alternative Dispute Resolution Rule 2.11; it must acknowledge judicial immunity of the mediator equivalent to that provided in Alternative Dispute Resolution Rule

1.5; and it must require that all provisions of any resulting mediation settlement agreement must be written and signed by each person and any attorneys participating in the mediation.

Rule 8.4. Preliminary Considerations.

The mediator and participating persons should schedule the mediation promptly. Before beginning the mediation session, each participating person is encouraged to provide the mediator with a written confidential summary of the nature of the dispute, as outlined in Alternative Dispute Resolution Rule 2.7(c).

Rule 8.5. Good Faith.

In mediating their dispute, persons should participate in good faith. Information sharing is encouraged. However, the participants are not required to reach agreement.

Rule 8.6. Settlement Agreement.

If an agreement is reached, to be enforceable, all agreed provisions must be put in writing a signed by each participant. This should be done promptly as the mediation concludes. A copy of the written agreement shall be provided to each participant.

Rule 8.7. Subsequent ADR and Litigation.

If no settlement agreement is reached, put in writing, and signed by the participants, the participants may thereafter engage in litigation and/or further alternative dispute resolution.

Rule 8.8. Deadlines Not Changed.

WARNING: Participation in optional early mediation under this Rule does not change the deadlines for beginning a legal action as provided in any applicable statute of limitations or in any requirement for advance notice of intent to make a claim (for example, for claims against government units under the Indiana Tort Claims Act).

Form A: ~~Letter Requesting Pre-Suit Mediation~~ Agreement for Optional Early Mediation

Date

Re: Claimant v. ABC Co.

Dear _____:

Please accept this letter as a request for pre-suit mediation of the above-referenced matter in

~~accordance with the guidelines suggested in the Indiana State Bar Association's Pre Suit Mediation Program. A copy of the guidelines is enclosed for reference.~~

~~If you agree to pre-suit mediation of this matter, please contact me so that we can select a mediator and enter into a pre-suit mediation agreement.~~

~~Very truly yours,~~

~~By _____
XXXXXXXXXX, Esq.~~

The undersigned persons, and their undersigned attorneys, if any, agree to mediate their dispute in accordance with the following:

1. _____ will serve as the mediator and will be compensated at the total hourly rate of \$ _____. Each participating person is responsible for paying one-half of the mediator's fees and expenses unless otherwise agreed in writing before or during the mediation.
2. The mediation will be conducted in accordance with Rule 8 -- Optional Early Mediation of the Indiana Rules for Alternative Dispute Resolution.
3. Each participant understands and agrees that the mediator is neutral, that the mediator does not represent any participant, and that the mediator's conduct is governed by Alternative Dispute Resolution Rule 7.
4. Each participant agrees that the mediator shall have immunity in the same manner and to the same extent as a judge in the State of Indiana. Each party agrees that any attempt to challenge this immunity in any proceeding shall entitled the mediator to a judgment against the party asserting the challenge for the amount of any resulting judgment plus all reasonable attorney fees, court costs, and all other expenses incurred by the mediator as a result of the challenge.
5. The mediation shall be regarded as settlement negotiations and shall be subject to the same confidentiality protections as provided in Alternative Dispute Resolution Rule 2.11. The participants and the mediator understand and agree that the mediator cannot be compelled to testify regarding any matter discussed during the mediation, which shall be considered confidential and privileged. It is also agreed that the confidentiality requirement may not be waived by any participant or mediator.
6. The participants may agree to settle all or part of the dispute. For a settlement agreement to be binding and enforceable, however, all agreed provisions must be put in writing and signed by each participant and each participating attorney.
7. The mediation shall be conducted in accordance with Indiana Alternative Dispute Resolution Rule 2.7.

8. If the optional early mediation does not result in an agreed full settlement of the dispute, the participants may later use mediation, before or after the filing of any related law suit, and may use the same or a different mediator, as the participants may agree.

9. Either participant may terminate the mediation at any time by a letter to the mediator and a copy to the other participants in the mediation.

10. The mediator may terminate the mediation at any time because of an impasse or if for any reason the mediator deems it improper, unproductive, or unconscionable to continue. The mediator may disclose only to the participants and any participating attorneys the reason(s) for terminating the mediation, but such disclosure is optional at the mediator's sole discretion.

11. The parties agree to mediate in good faith but are not required to reach an agreement.

_____	_____	_____	_____
<u>Participant</u>	<u>date</u>	<u>Participant</u>	<u>date</u>
_____	_____	_____	_____
<u>Attorney (if any)</u>	<u>date</u>	<u>Attorney (if any)</u>	<u>date</u>
_____		_____	
<u>Mediator</u>		<u>date</u>	

Form B. Pre-Suit Mediation Agreement.

~~The undersigned parties, in person and by counsel, agree to mediate their dispute, prior to the filing of litigation, pursuant to the following terms:~~

~~1. _____ will act as the mediator and will be compensated at the total hourly rate of \$ _____. Each party is responsible for paying one half of the mediator's fees and expenses unless otherwise agreed by the parties prior to or during mediation.~~

~~2. The mediation will be conducted in accordance with the Pre-Suit Mediation Guideline established by the Indiana State Bar Association.~~

~~3. Although the mediator is an attorney, the mediator does not represent either side and does not offer and will not give legal advice or legal counsel.~~

~~4. The mediator shall have immunity in the same manner and to the same extent as a judge in the state of Indiana. Any attempt to challenge this immunity in any proceeding shall entitle the mediator to a judgment against the party raising such challenge for the amount of reasonable attorney fees and court costs and other direct and indirect costs incurred by the mediator as a result of such challenge.~~

~~5. The mediation shall be regarded as settlement negotiations and shall be subject to the same confidentiality protections as provided in Indiana ADR Rule 2.11.~~

~~6. The parties, their counsel and the mediator agree that each has a privilege to refuse to testify and to prevent the other from testifying about any communication made during the mediation.~~

~~7. The mediation shall be conducted in accordance with the mediation procedure described by Indiana ADR Rule 2.7 except that in lieu of reporting to any court about the mediation, the mediator will report to the Indiana State Bar Association that a pre-suit mediation was held and that it did or did not result in a settlement, without further comment or recommendation.~~

~~8. If the pre-suit mediation does not result in a settlement, the parties may use mediation again after suit has been filed and, upon agreement of the parties, may use the same mediator.~~

~~9. Either party may terminate the mediation at any time by a letter to the mediator with a copy being sent to the other party.~~

~~10. The mediator may terminate the mediation at any time because of an impasse or if for any reason the mediator deems it improper or unproductive to continue. The mediator will not be required to disclose the reason for terminating the mediation but may do so, to the parties and their attorneys only, at the mediator's sole discretion.~~

~~11. The parties shall mediate in good faith but are not required to reach an agreement.~~

Party

Party

Attorney

Attorney

Mediator

Form C: Pre-Suit Mediation Report

Indiana State Bar Association
Indiana Bar Center
230 East Ohio Street, 4th Fl.
Indianapolis, IN 46204-2199
Attn: Pre-Suit Mediation Committee

Pre-Suit Mediation Report

1. Date of _____
_____ Mediator

2. Subject of dispute, check one:

☐ Personal Injury

☐ Property Damage

☐ Commercial

☐ Employment

☐ Domestic Relations

☐ Other, briefly describe

3. Settled: Yes or No (circle one) _____

This amendment shall take effect January 1, 2003.

The Clerk of this Court is directed to forward a copy of this Order to the clerk of each circuit court in the state of Indiana; Attorney General of Indiana; Legislative Services Agency and its Office of Code Revision; Administrator, Indiana Supreme Court; Administrator, Indiana Court of Appeals; Administrator, Indiana Tax Court; Public Defender of Indiana; Indiana Supreme Court Disciplinary Commission; Indiana Supreme Court Commission for Continuing Legal Education; Indiana Board of Law Examiners; Indiana Judicial Center; Division of State Court Administration; Indiana Judges and Lawyers Assistance Program; the libraries of all law schools in this state; the Michie Company; and the West Group.

The West Group is directed to publish this Order in the advance sheets of this Court.

The Clerks of the Circuit Courts are directed to bring this Order to the attention of all judges within their respective counties and to post this Order for examination by the Bar and general public

DONE at Indianapolis, Indiana, this _____ day of July, 2002.

Randall T. Shepard
Chief Justice of Indiana

